164-703

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 384. 109

THE UNITED STATES, APPELLANT,

vs.

MITCHELL KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED MAY 26, 1894.

(15597.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 381.

THE UNITED STATES, APPELLANT,

vs.

MITCHELL KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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1 *Caption.*

The United States of America, district of South Carolina, in the circuit court, fourth circuit, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, begun and holden at Charleston, in the district aforesaid, on the 13th day of November, 1893, before the Honorable Charles H. Simonton, judge of the United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

MITCHELL KING, PLAINTIFF-PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

Be it remembered that heretofore, to wit, the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, the said plaintiff-petitioner, by his attorneys, Messrs. Bryan & Bryan, filed the following petition and complaint, which petition and complaint is in the words and tenor following:

2 *Petition & complaint.*

The United States of America, district of South Carolina, in the circuit court, fourth circuit, to wit:

MITCHELL KING, PLAINTIFF PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

To the circuit court of the United States for the district of South Carolina:

The petition and complaint of Mitchell King, complaining against the United States, respectfully shows and alleges:

First. That the plaintiff, your petitioner, Mitchell King, is a citizen of the United States and resides at "Kingstree plantation" in the county of Beaufort, in the State of South Carolina.

Second. That your petitioner has a claim against the United States of America for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

Third. That your petitioner was at the times hereinafter mentioned and now is a' owner of a certain rice plantation on the waters of the Savannah River more particularly described as follows, to wit:

"All that rice plantation or parcel of land situate, lying, and being in the county of Chatham, in the State of Georgia, on the upper portion of Argyle Island, commonly known by the name of "Red Knoll," containing 414 acres more or less, bounded by Savannah Middle River, Savannah Back River, and lands of Anthony Barclay and McAlpin, which lands of said McAlpin and Barclay formerly appertained to the
3 estate of Richard N. Styles and were made off from lands formerly of the estate of the late Richard Wayne the elder, deceased, and

having such shape as is delineated on a certain map or plan of John McKinnon, surveyor, which shows as well the 414 acres sold to M. C. King by the Hon. James N. Wayne, associate justice of the Supreme Court of the United States, on the 11th March, 1844, as lands allotted to the estate of the said Richard N. Styles, 1844, belonging to the said Barclay and McAlpin, and which map bears date the 12th day of April, 1824, as the same is particularly described in the deed of conveyance of Hon. Samuel M. Wayne, aforesaid, to Mitchell C. King in 1844.

Fourth. That the said rice plantation, "Red Knoll" as aforesaid, lying at the head of Argyle Island, at the junction of the Savannah Middle River with the Savannah Back River, is distant from and above the city and port of Savannah about 9 miles.

Fifth. That the said plantation for the space of 70 years and upwards has been a rice plantation, with great labor and expenditure of money reclaimed and established and mantained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah River, and depending for its proper drainage and cultivation upon the maintainance of the natural flow of the said Savannah River in, through, and over its natural channal, along its natural bed, to the waters of the Atlantic Ocean, and depending also upon the maintainance of the natural and regular rise and fall of the waters of the said Savannah River under the influence of the tides therein and thereupon.

Sixth. That theretofore for several years continuously, and now continuously, the said Government of the United States of America in the exercis' of its powers of eminent domain under the Constitution of the United States, and by authority of the acts of Congress duly empowering its officers and agents thereto, in that case made and provided, did erect,
4 build, and maintain, and continuously since have been erecting, building, and maintaining, and are now building, erecting, and mantaining in and across the said Savannah River in the bed of the said Savannah River, certain obstructions and dams, obstruction and hindering the natural flow of the said Savannah River through, in, and along the natural bed thereof, and raising the said Savannah River feet at the point of and above the said obstructions or dams in the bed of the said Savannah River, and causing the said waters of the Savannah River aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah River along its natural bed at the points of the said dams and obstructions and at points above the said dams and obstructions in said river.

Seventh. That the said dams and obstructions have been and are being erected and maintained in the bed of the said river at a great height at divers places in said river below the said plantation of your petitioner.

Eighth. That the effect of the said dams and obstructions in said Savannah River upon the said rice plantation of your petitioner, commonly known as Red Knoll, is that it backs the waters of the Savannah River in and upon the said plantation, and it raises and forces back the waters of the Savannah River at, in, and around and upon the said plantation to the height of about two feet over and above the natural and ordinary levey of the said Savannah River existing at, in, and around the said plantation at the time of its establishment as a rice plantation, and previous

to the erection and maintainance of the said obstructions and dams by the United States, and thus preventing the natural outflow of water from the said plantation, necessary for the purpose of drainage and cultivation of sa'd plantation, and preventing the established and proper inflow
5 and outflow of the waters of the Savannah River, necessary to the cultivation of the said plantation as a rice plantation, and further filling the ditches and saturating the lands with water, and preventing the outflow of water from the said Red Knoll plantation and submerging and destroying the crops, and preventing the drainage of the said plantation for cultivation for any purpose whatsoever; and that by the said superinduced additions of water actually invading the said rice plantation the same is permanently injured and effectually destroyed.

Ninth. And your petitioner further shows that the said acts of the Government of the United States as aforesaid have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress, for the purpose of improvement of the harbor of Savannah and deepening the waters of the Savannah River at the port of Savannah, a port of entry of the United States and a seaport of the United States of America, situated within the State of Georgia, on the Savannah River, a navigable river of the United States, navigable to the Atlantic Ocean, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah River, a boundary between the States of South Carolina and Georgia, and a navigable river of the United States, for the public use, purpose, and benefit of interstate and foreign and international trade and commerce and for other public purposes, uses, and benefits.

Tenth. The plaintiff-petitioner further shows and alleges that by reason of the premises there is due and owing unto the plaintiff-petitioner by the United States, for and in consideration of the facts hereinbefore alleged, and the taking by the United States of the said plantation for public
6 uses, as in the manner and form heretofore alleged, the sum of ten thousand dollars ($10,000.00), the value of and lawful compensation for such property so taken.

Wherefore the plaintiff-petitioner prays judgment against the United States of America for the sum of ten thousand dollars ($10,000.00).

BRYAN & BRYAN,
Attorneys for Mitchell King, Plaintiff-Petitioner.

UNITED STATES OF AMERICA,
District of South Carolina:

Personally appeared Mitchell King, plaintiff-petitioner herein, and makes oath that the matters and things set forth and stated in the above complaint and petition are true to his own knowledge.

MITCHELL KING.

Sworn to before me this 19th day of January, 1893.

[SEAL.] ARTHUR BRYAN,
Notary Public for S. C.

Filed 19th January, 1893.

7 *Affidavit of service.*

United States of America, district of South Carolina, in the circuit court, fourth circuit.

MITCHELL KING
vs.
THE UNITED STATES. } Petition and complaint. Filed 19th Jan'y, 1893.

Personally appeared H. W. Hendricks, dep. marshal U. S., district South Carolina, and makes oath that he served the above petition and complaint on Hon. Abial Lathrop, district attorney of the United States for the district of South Carolina, by leaving a certified copy of the same with B. A. Hagood, asst. U. S. dist. atty., S. C., at the office of the U. S. district attorney, Charleston, S. C., on the 20th day of January, 1893, and deponent is not a party to or interest in the result of this action.

Deponent further makes oath that he mailed a certified copy of the said petition and complaint by registered letter to the Hon. W. H. H. Miller, Attorney-General of the United States, by depositing the same, enclosed in an envelope, in the post-office at Charleston, S. C., on the 20th day of January, 1893, addressed "Hon. W. H. H. Miller, Attorney-General of the United States, Washington, D. C.," postage prepaid.

W. H. HENDRICKS,
Chief Depty. U. S. M.

Sworn to before me this 20 day of Jan'y, 1893.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed 20th Jan'y, 1893.

8 *Answer.*

The United States of America, district of South Carolina, circuit court, fourth circuit.

MITCHELL KING
vs.
THE UNITED STATES.

The defendant, by Abial Lathrop, United States attorney for the district of South Carolina, answering the petition and complaint herein, alleges:

I. That this defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the first, third, fourth, and fifth paragraphs of the said petition and complaint.

II. This defendant admits the allegations contained in the sixth and ninth paragraphs of the said petition and complaint and so much of paragraph seventh as allege that the said dams and obstructions have been and are being erected and maintained in the bed of the said river at divers places in said river below the plantation of plaintiff-petitioner.

III. That this defendant denies all the allegations contained in paragraphs second, eighth, and tenth of the said petition and complaint.

IV. That this defendant denies each and every allegation in the said petition and complaint not hereinbefore specifically admitted or denied.

Wherefore this defendant prays judgment that the said petition and complaint be dismissed, and for the costs of this action.

ABIAL LATHROP,
Defendant's Attorney.

9 UNITED STATES OF AMERICA,
District of South Carolina.

Personally appeared before me Abial Lathrop, United States attorney, and made oath that the above and foregoing answer is true to the best of his knowledge, information, and belief. That his information is derived from certified copies of departmental records on file in his office.

ABIAL LATHROP,
U. S. Attorney.

Sworn to and subscribed before me this 16th March, 1893.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed 16th March, 1893.

10 *Trial of cause.*

At a special term of the circuit court begun and holden at Charleston, S. C., on the 11th day of October, 1893, and continued from day to day until the 13th day of November, 1893, this cause came up for trial before the court. The pleadings were read and an oral demurrer was entered by the district attorney for the United States. The following witnesses were sworn and examined on behalf of the plaintiff, to wit: Mitchell King, J. H. Lynah, and Alfred Chisolm, and the following witness was sworn and examined on behalf of the United States, to wit: O. M. Carter. Arguments were made by Mr. J. P. K. Bryan on behalf of plaintiff, and by Mr. Wm. Perry Murphy, U. S. attorney, on behalf of the United States. The court took the case under advisement.

11 *Finding of facts and law.*

United States of America, district of South Carolina, in the circuit court.

MITCHELL KING
vs.
THE UNITED STATES.

This action was brought in this court under provision of act of Congress March 3rd, 1887, chapter 359, sections 1, 2, &c.

Finding of facts.

1. The above petition was in compliance with the requirements of act of March 3rd, 1887, chapter 359, duly filed in the clerk's office, cir-

cuit court of the United States for the district of South Carolina, on the 19th day of January, 1893, and copies thereof duly served on the United States district attorney and the Attorney-General of the United States, and said law in all respects complied with.

2. Mitchell King, the plaintiff, is a rice planter on the Savannah River. He owns a plantation on the South Carolina side of the river in Beaufort County. His sole occupation is cultivating this plantation. To this end since 1890 he has been living upon it from November until the middle of May in each year, in a furnished dwelling house, and domestic servants. After 15th May he goes to Savannah, the plantation then becoming unhealthy, and lives in a boarding house, visiting his plantation at intervals, longer or shorther as the state of the crops may require.

He has registered and voted in Savannah, and does not vote in South Carolina.

3. He owns in fee simple another plantation on the Savannah River, the subject-matter of this suit, particularly described in the complaint, known as "Red Knoll," formerly used exclusively in the cultivation of rice, situated on Argyle Island, about 12 miles by river above the
12 city of Savannah. This plantation has been cultivated in rice for very many years and was in first-class order. It has been owned by plaintiff since 1881, contains 414 acres, and, with the natural flow of the current of the Savannah River and unimpaired drainage, is worth from 30 to 40 dollars per acre by market value.

4. Plaintiff continued to plant rice his ownership in 1881. His crops grew worse and worse, and in 1888 he abandoned the plantation, it having become unfit for cultivation. It is not now cultivated except in small knolls or patches, and by colored people.

5. On the Savannah River where this plantation lies the water is always fresh, and land below high-water mark and above low-water mark is reclaimed from the river by dykes or banks. Through these banks are inserted trunks or wooden boxes, having flood gates in each of them, leading into canals and ditches through the reclaimed land. Through these the lands are irrigated, and through them also the lands are drained when the time comes for draining the water off. The rise and fall of the tide (fresh water) contributes materially to this drainage.

6. In the United States Government, in the lawful exercise of its powers of eminent domain and regulation of commerce under appropriations made for several years and now being made by Congress for the purpose, and under the direction of the Secretary of War, vested with full discretion by Congress in the premises, erected and are now erecting and maintaining certain structures in the Savannah River, beginning at points below this plantation, said structures being intended both to deepen the channel and to raise the nat*ion*al level of the current of that river. One of these, and the most important, is the cross-tide dam between Island and Argyle Island, completed in 1885. This is the obstruction nearest to this plantation of plaintiff, being about six miles off.

7. By reason of this obstruction the direction of the current is changed, the force of the ebb tide in the river is diminished, and the fresh
13 water is backed up towards the plantation of plaintiff, raising the level of the current above its normal nature level from 12 to 18

inches at the banks of the said plantation. This result followed the erection of the cross-tide dam ; and the height of the water has remained the same since that time to the present.

8. The first effect of this is to deprive the plantation of that much fall of the tide, and so diminish its drainage. Another result is that the trunks which theretofore necessarily had been placed just above the level of low tide came below that line. Another result was that by seepage the water pressed under the bank and rose in the plantation in a number of small springs, until gradually the water level in the land rose to the height of the increased water level in the river, and the superadded water in the plantation was 18 inches thereby.

9. The general result is that by reason of the diminished drainage capacity of the plantation neither the water let in for the purposes of irrigation, nor overflows from freshets, nor the superadded water thus forced into the plantation by seepage could be gotten off the land, which thereby and therefrom became sodden, sour, and boggy, gradually losing its productive power, so that in 1888 it became almost valueless, certainly for rice planting and probably for any other known system of agriculture. This is its present and permanent condition ; and its ordinary and necessary use for agriculture is destroyed.

10. This gradual result was begun to be felt when the cross-tide dam was finished, and was experienced in 1885, 1886, and 1887, and gradually grew worse and has existed continually to the present time. The plantation was finally abandoned from these causes in 1888.

11. Beyond the backing up of the water on and in the plantation by reason of the obstructions, and this invasion of these lands by this added water *water* around and in the plantation as above described, rendered necessary by the execution of the Government plans as above set
14 forth, the United States Government has not and does not use these lands for any purpose, nor is it in possession of them or any part of them.

12. That the purpose of raising the waters of the Savannah River and backing the waters thereof at and upon, around and in the plantation of the petitioner is for the improvement of the harbor of Savannah and deep'ning the waters of the Savannah River at the port of Savannah a port of entry of the United States, situated within the State of Georgia on the Savannah River, a navigable river of the United States.

13. The difference between the market value of the said plantation described in the petition before the obstructions of the United States Government above set forth and the value of the plantation after the said obstructions and the backing of the waters of the Savannah River upon, at, in, and around said plantation is the sum of ten thousand dollars, the amount claimed by the petitioner.

The district attorney, in behalf of the United States, entered his motion to dismiss the petition on these grounds—

1st. Because the plaintiff is not a resident of this district, and for this reason the court has no jurisdiction on his claim.

2nd. That this cause of action accrued in 1885, when the cross-tide dam was erected, more than six years before he filed his petition, and he can not maintain his suit. It is a condition precedent to this right to sue that the cause of action accrued within six years prior to his suit.

3rd. That the evidence discloses no such taking of the plaintiff's land for public purposes as brings him within the V amendment, and so entitled to compensation.

Conclusions of law.

1st. The plaintiff, having his business in South Carolina, remaining in that State six months in the year, with a house in which he lives, and domestics by whom he is served, leaving during the unhealthy season for health only, is a resident of this district and the court has jurisdiction on his claim.

2nd. Although the water in Savannah River was raised and thrown on the plantation when the dam was built in 1885, the full consequences were not ascertained and realized until 1888, when the plantation was abandoned. In that year the cause of action was complete. This action, begun in 1893, is within the statutory period of six years.

3rd. The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in Savannah River has been raised at plaintiff's land, and has been backed on it so that the drainage has been destroyed, the water kept on the land and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided. (Pompelly vs. Green Bay Co., 13 Wall., 181.)

4th. The claimant is entitled as compensation to ten thousand dollars. Let judgment be entered accordingly, with costs allowed by this act.

11th December, 1893.

CHARLES H. SIMONTON,
U. S. Judge.

Filed 11th December, 1893.

Judgment.

United States of America, eastern district of South Carolina. Circuit court. Fourth circuit.

MITCHELL KING, PLAINTIFF,
vs.
THE UNITED STATES, DEFENDANT. } Judgment by the court.

This action having been brought to a trial by the court, and conclusions of facts and of law having been duly found and filed by the court on the eleventh day of December, 1893, whereby ten thousand dollars was found to be due to the plaintiff Mitchell King by the defendant, the United States, and an order to enter judgment accordingly was therein contained.

Now, on motion of Bryan & Bryan, attorneys for Mitchell King, plaintiff, it is adjudged that Mitchell King, plaintiff, recover of the said the United States the sum of ten thousand dollars, so found, with forty-nine $\frac{50}{100}$ dollars costs.

BRYAN & BRYAN,
Petitioner-Plaintiff's Attorney.

Taxed costs, signed. Judgment 15th Dec., 1893.
[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed 15th Dec., 1893.

17 *Petition for appeal and assignment of errors.*

United States of America, district of South Carolina, in the circuit court.

MITCHELL KING, PLAINTIFF-PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

To the honorable the judges of the United States circuit court for the district of South Carolina

Now comes your petitioner, the United States of America, defendant in the above-entitled action, and doth hereby petition for an appeal from the decree and judgment of this court, made on the 11th day of December, 1893, in the above-entitled cause, to the Supreme Court of the United States, and prays that the said appeal may be allowed, and that a transcript of the record and proceedings upon which said judgment and decree was rendered, duly authenticated, may be sent to the said Supreme Court of the United States, and herewith filed the following assignments of errors which are intended to be urged upon the hearing of said appeal in said Supreme Court of the United States:

I.

That the court erred in holding that the plaintiff was a resident of the district of South Carolina, whereas the court should have held that he was not a resident of said district, and therefore that the court had no jurisdiction in the cause.

18 II.

The court erred in not finding that the water at and above the cross-tides dam attained its greatest height in the year 1885, at the time the said dam was finished, and that the complainant's cause of action accrued at that time.

III.

That the court erred in finding that this action was brought within six years after the right accrued for which the claim was made.

IV.

That the court erred in not holding as matter of law that the complainant's cause of action accrued in 1885, and therefore that he was barred by the statute of limitations.

V.

That the court erred in holding as matter of law that there was such a taking, within the meaning of the Constitution of the United States and the acts of Congress, as entitled the complainant to recover in this action.

VI.

That the court erred in holding that the damages complained of were such as were recoverable in an action against the United States.

VII.

That the court should have held that this was a case sounding in tort, and that therefore the court was without jurisdiction in the cause.

VIII.

That the court erred in holding that there was any contract between the plaintiff and the defendant, either express or implied,
19 under which the plaintiff was entitled to recover judgment against the defendant.

IX.

That the court should have held, that the damages suffered by the petitioner resulted from the exercise of the paramount right of the United States to improve the navigable waters of the United States, and was therefore "damnum absque injuria."

X.

That the court should have held that the damages were consequential and not direct, and therefore the plaintiff was not entitled to recover.

WM. PERRY MURPHY,
U. S. Attorney.

Filed 27th February, 1894.

20 *Order allowing appeal.*

The United States of America, district of South Carolina, in the circuit court.

MITCHELL KING, PLAINTIFF-PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

And now, to wit, on the 27th day of February, 1894, it is ordered that the appeal herein prayed for by the United States be allowed as prayed for, and that a citation do issue in accordance therewith, returnable on the 29th of March, 1894.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 27th February, 1894.

We acknowledge to have been served with the within petition, assignment of errors, and order, this 28th day of February, 1894.

BRYAN & BRYAN,
Attys. Mitchell King, Piff. Petr.

21 *Citation.*

The United States of America, district of South Carolina, fourth circuit, in the circuit court.

MITCHELL KING, PLAINTIFF-PETITIONER,
vs.
THE UNITED STATES, DEFENDANT.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mitchell King, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, on the 29th day of March, in the year of our Lord one thousand eight hundred and ninety-four, pursuant to an appeal filed in the clerk's office for the circuit court of the United States for the district of South Carolina, wherein the United States is appellant and the above-named petitioner-plaintiff is appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles A. Simonton, judge of the circuit court of the United States for the fourth circuit, this 27th day of February, A. D. 1894.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 28th February, 1894.

22 *Service of citation.*

We acknowledge service of this citation this 28th day of February, 1894.

BRYAN & BRYAN,
Plffs. Pet. Attorneys.

23 *Clerk's certificate.*

The United States of America, district of South Carolina, in the circuit court, fourth circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Mitchell King, plaintiff-petitioner, against The United States, defendant, rendered as aforesaid, together with the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., and district of South Carolina, this the 14th day of March, A. D. 1894.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

No. roll . United States of America, district of South Carolina, fourth circuit. In the circuit court. complainants, against defendants. Solicitor. Entered on journal, page . Filed day of , 189 . C. C. C. U. S., dist. S. C.

(Indorsement on cover:) Case No. 15597. Term No. 381. The United States, appellant, vs. Mitchell King. South Carolina. C. C. U. S. Filed May 26th, 1894.

164-703

SUPREME COURT, U. S.
FILED
NOV 16 1896
JAMES H. McKENNEY,
CLERK

164-703

BRIEF OF APPELLEE IN REPLY.

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 109.

THE UNITED STATES, DEFENDANT, APPELLANT,

vs.

MITCHELL KING, PLAINTIFF, APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

1

MOTION TO DISMISS APPEAL.

J. P. K. BRYAN,
Counsel for Appellee, Mitchell King.

The contention of the United States in the brief submitted in opposition to appellee's motion to dismiss this appeal, is that there is some doubt as to the meaning of the decision of this Court in the case of *Chase vs. United States, 155 U. S. 489.*

2

It is difficult to comprehend this position of the Government at this time, for in that case the United States requested the opinion of this Court on this *particular question*, in these words:

"This case coming to this Court as it does by writ of error, presents the opportunity for an *authoritative construction* of the appellate provisions of the Act of March 3, 1887, c. 359, 24 Stat. 505, cemmonly known as the Tucker Act, and for the *decision* of the question whether the *judgments* of the *Circuit and District Courts* under that peculiar jurisdic-

3

tion should be brought up for review *by appeal or writ of error.*"

Argument of Assistant Attorney General, Chase vs. U. S. 155 U. S., p. 492.

In response to this direct request for a decision of this particular question, the Court answered:

4 "Throughout all the provisions relating to actions commenced in these (Circuit and District) Courts, there is shown a purpose to preserve the distinction between cases at law, cases in equity and cases in admiralty."

Id., p. 498, 499.

And after a full examination of the provision of the Act on page 499, this Court concludes:

"These phrases, clauses and provisions make it, we think, reasonably clear that Congress intended that the final determination of suits brought under this Act in a *District or Circuit Court* of the United States shall be reviewed here
5 *upon writ of error, if the case be one at law,* and upon appeal, if the case is one cognizable in equity or in admiralty, under the existing statutes regulating the jurisdiction of those Courts."

Id., p. 499.

This decision of this Court is a direct answer to the very question submitted by the United States, asking for an "*authoritative*" construction of the appellate provisions of the Act in this very particular, and we submit concludes the question now.

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6 The counsel for the United States in his Brief quotes the case of *United States vs. Davis, 131 U. S., 36,* as an authority for the position that there was reserved to the United States by this Act a right "to an *appeal.*" (Page 2, Brief.)

An examination of that case will, however, show that the only question then before this Court was whether the United States had the right "*to appeal,*" *i. e*, the right to invoke the appellate jurisdiction of this Court, from such judgment when the amount was under Five Thousand Dollars, or, in the words of counsel on motion to dismiss therein, "that the United States are not entitled to a *writ of error or appeal* if the same remedy would not be afforded under
7 similar circumstances to a private party." (P. 39.) And this Court decided that inasmuch as Sec. 707 of Rev. Stat. gave right of appeal from Court of Claims to Supreme

Court from all judgments, irrespective of amount, so right of appeal was reserved by the Act to United States from all judgments of Circuit and District Courts, *irrespective of amount.* (P. 36-39)

It is clear that the word "*appeal*" and "*right of appeal*" referred to in this case of *Davis vs. United States* is "*appeal*" in its general sense as defined by the text writers to be "the removal of a cause from a Court of inferior to one of superior jurisdiction, for the pur- 8
pose of obtaining a review and re trial," (Bouvier's Law Dictionary. "*Appeal*" and cases) and not "appeal" in its limited sense, as contrasted with a writ of error, as a method of legal procedure in invoking such appellate jurisdiction in an Equity cause.

The question when and in what cases a writ of error or an appeal was, under the Act, a proper method of procedure, was not before the Court or even touched upon in *U. S. vs. Davis, 131 U. S 36,* and was examined and decided, upon special request of the United States, by this Court for the first time, in *Chase vs. United States, Supra.*

9

The counsel for the Government has seen fit, in his brief on this motion to dismiss, to refer to the merits of this case, and to say that "it is believed that grave error in a question of law was committed by Court below," (page 3.) and we trust we may, therefore, take the liberty of referring to the merits and ask the Court to examine the case and ascertain the justice of this judgment below. It is briefly this in the record:

"A rice plantation on Savannah River, (formerly owned 10
by Justice Wayne of this Court,) under cultivation since 1844, was by erection of dams by U. S. Government in recent improvement of Savannah River, under Act of Congress, destroyed by the backing of water on it." The Court finds, "the superadded water in the plantation was eighteen inches thereby," and therefrom "it became sodden, sour and boggy and valueless for rice planting and probably for any other known system of agriculture." "This is its present and permanent condition and its ordinary and necessary use for agriculture is destroyed." "The plantation was finally abandoned in 1888 from these causes."

11

Here is an actual, physical invasion and permanent ouster of the owner from private property, whose ordinary

and necessary use is destroyed for public use and benefits, and we need only quote the principles decided by this Court to indicate the justice of this claim.

This Court (by Justice Miller) decided in *Pumpelly vs. Green Bay Company, 13 Wallace, 166*, (see rubric) the following principles:

"By the general law of European nations and the Common Law of England, it was a qualification of the right of
12 eminent domain, that compensation should be made for private property taken or sacrificed for public use."

"And the constitutional provisions of the United States and of the several States, which declares that private property shall not be taken for public use without full compensation, were intended to establish this principle *beyond legislative control.*"

"It is not necessary that property should be absolutely *taken*, in the narrowest sense of the word, to bring the case within the constitutional provision. There may be such
13 serious interruption in the common and necessary use of property as will be equivalent to a *taking* within the meaning of the Constitution."

"The backing of water so as to overflow the lands of an individual, or any other *superinduced addition of water*, earth, sand or other material or artificial structure placed on land, if *done under Statutes authorizing it for public benefit*, is such a taking as by the constitutional provision demand compensation."

"Lands bordering on a navigable stream are as much
14 within the protection of the constitutional principle awarding compensation as other private property."

Idem. 13 Wall, 166.

The judgment below awarding compensation for the property of the private citizen found by the Court below to be so taken rightfully by the United States under Acts of Congress in the exercise of its powers of eminent domain, under an implied contract to pay just compensation, (U. S. vs. Great Falls Mfg. Co., 124 U. S., 645) rests therefore, upon the highest considerations of public morality, *the established principles of constitutional law*, and the express and repeated
15 decisions of this Court.

J. P. K. BRYAN,
Counsel for Mitchell King, Appellee.

164-703

Office Supreme Court, U. S.
FILED
NOV 14 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

UNITED STATES, APPELLANT,
v.
MITCHELL KING. } No. 109.

APPELLANT'S BRIEF ON MOTION TO DISMISS APPEAL.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

UNITED STATES, APPELLANT,
v.
MITCHELL KING. } No. 109.

APPELLANT'S BRIEF ON MOTION TO DISMISS APPEAL.

I.

This appeal is the last illustration of a practice which had maintained continuously from the conferring of jurisdiction over claims cases upon circuit and district courts in 1887. The officers of the Department of Justice construed that statute (chapter 359 of the laws of 1887) as not only conferring *jurisdiction* concurrent with the Court of Claims, but also concurrent *practice* as to the review of those judgments.

Section 9 of the act of 1887 gave to the parties "the same rights of appeal and writ of error as are now reserved in the statutes of the United States in that behalf made * * *. The modes of procedure in claiming and

perfecting an appeal or writ of error shall conform in all respects as near as may be to statutes giving appeals and writs of error in like cases."

This court, in one of the first cases coming up from that jurisdiction (*United States* v. *Davis*, 131 U. S., 36), as early as May, 1889, decided that the rights of appeal and writ of error reserved by the Tucker Act were the same as formerly existed from the Court of Claims, and that the words in that act "reserved in the statutes of the United States in that behalf made" meant reserved with reference to judgments in cases of claims against the United States in the Court of Claims, and sustained the right of the Government to an *appeal*.

The officers of the Department of Justice, relying upon this case, pursued uniformly the same practice as had been pursued in appealing from judgments from the Court of Claims, and every case brought to this court by the United States, and indeed every case (more than twenty in number) which had been decided in this court upon the merits up to the case of *Chase* v. *The United States* (155 U. S., 489), in 1895, was decided upon appeal and not upon writ of error.

Observing, however, some uncertainty as to the practice among members of the bar of the various circuit and district courts, the writer brought the case of *Chase* v. *The United States*, which had come up on writ of error, to the attention of this court by motion to dismiss, in order that an authoritative rule might be promulgated. This court in that case said that writ of error was the proper process for review of judgments in cases under

the Tucker Act, and apparently held that appeal was not a proper remedy.

The present appeal was taken before the decision of the Chase Case, in accordance with the uniform practice preceding it, which had so often been impliedly approved by this court, and, as was at least understood, expressly approved in the Davis Case. It is believed that grave error upon a most important question of law was committed by the court below, which ought not to go without review by this court.

Some doubt having been expressed by the members of the bar as to whether this court had decided in the Chase Case not only that the writ of error was proper, but that appeal did not lie, and the circuit court of appeals for the eighth circuit, in the case of *The United States* v. *Morgan* (64 Fed. Rep., 4), having decided that the effect of the Tucker Act was to preserve both the rights of appeal formerly existing from the Court of Claims and of writ of error formerly existing to review the judgment of circuit and district courts, it seemed to me proper to submit once more that question, instead of voluntarily dismissing this appeal, and thereby assuming the individual responsibility of making conclusive and irreparable the liability of the Government upon this judgment, believed to be erroneous.

II.

Counsel for appellee, in his second cause of motion to dismiss, misapprehends the grounds on which the appeal direct to this court instead of to the circuit court

of appeals is based. It rests not upon the simple question of the jurisdiction of the court below, but upon the fourth clause of section 5 of the act of March 3, 1891, giving an appeal direct to this court "in any case that involves the construction or application of the Constitution of the United States."

The sole grounds upon which the liability of the Government is predicated, in this class of cases, to recover compensation to riparian owners for injury to or interruption of their property rights resulting from structures in improvement of navigation, is that the clause of the Constitution, "That private property shall not be taken for public use without due compensation," is to be construed as providing that when private property is taken for public use the United States shall be liable for compensation, and therefore a claim arises therefor, "founded upon the Constitution of the United States," in the language of the first clause of the Tucker Act. The question to be presented is not that of jurisdiction, except incidentally; it is whether the Constitution by a prohibitory clause is to be construed as affirmatively conferring a pecuniary obligation enforceable in court, and also whether the facts in this case fall within the meaning of the words in the Constitution "taken for public use."

Respectfully submitted.

JOSHUA ERIC DODGE,
Assistant Attorney-General.

164-703

Office Supreme Court, U. S.
FILED
OCT 30 1896
JAMES H. McKENNEY
CLERK

164-703

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 109.

THE UNITED STATES, DEFENDANT, APPELLANT,

vs.

MITCHELL KING, PLAINTIFF, APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

MOTION TO DISMISS APPEAL.

J. P. K. BRYAN,
Counsel for Appellee, Mitchell King.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 109.

THE UNITED STATES, DEFENDANT, APPELLANT,

vs.

MITCHELL KING, PLAINTIFF, APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

MOTION TO DISMISS APPEAL.

Notice.

To Hon. JUDSON HARMON,

Attorney General of the United States,

Counsel for the United States, Defendant, Appellant:

Please take notice that on behalf of the plaintiff, appellee, I will move the United States Supreme Court, on Monday, 16th day of November, 1896, at 12 m., or as soon thereafter as counsel can be heard, on the transcript of record herein,

and also on the certified transcript of the record of this cause from the circuit court of appeals of the United States for the fourth circuit, hereto annexed as Exhibit "A," to dismiss the appeal herein for want of jurisdiction of the United States Supreme Court, on the following grounds, to wit:

1. Because it appears by the record herein that this cause is an action at law, and that it does not appear that the defendant, appellant, excepted at the time to either the rulings, findings, or judgment of the circuit court of the United States for the district of South Carolina, or that a bill of exceptions was presented, signed, and made part of the record, or that a writ of error was sued out and served and returned to this Court as required by law.

2. Because it appears by the certified transcript of the record hereto annexed as Exhibit "A" that the said cause was, at the election of the defendant, The United States, taken as a whole by appeal to the circuit court of appeals of the United States for the fourth circuit on the whole case and said appeal was dismissed on hearing on October 4, 1894.

3. Because the question of jurisdiction raised in the record is not certified to this Court by the circuit court of the United States for the district of South Carolina.

J. P. K. Bryan,
Counsel for Mitchell King,
Plaintiff, Appellee.

ARGUMENT.

First Ground.

This action was brought by the plaintiff, Mitchell King, against the United States, defendant, in the circuit court of the United States for the district of South Carolina, for compensation for lands "taken" by the United States for public use, under act of Congress of March 3, 1887, chapter 359, sections 1 and 2.

The judgment below against the United States was in a case at law, being for compensation under implied contract for such lands taken by the United States for public use.

Record, fol. 2, 6, 15, 16.

The defendant, United States, has come to this Court on an appeal and not by writ of error, and, under the decision of this Court in *Chase vs. United States*, 155 U. S., 498, construing said act of Congress of March 3, 1887, this appeal is not sustainable. The Court, by Justice Harlan, said:

"Throughout all the provisions relating to actions commenced in those courts there is shown a purpose to preserve the distinction between cases at law, cases in equity, and cases in admiralty. The phrases 'judgment or decree,' 'right of exception or appeal,' 'equity or admiralty,' 'rights of appeal or writs of error,' and 'appeal or writ of error,' taken in connection with the clause in the fourth section relating to the jurisdiction of the respective courts of the United States proceeding under the act and providing that 'the course of procedure shall be in accordance with the established rules of said respective courts and of such additions and modifications thereof as said courts may adopt;' with that part of

section seven which in terms refers to the distinction between cases at law and cases in equity and admiralty, and directs that 'if the suit be in equity or admiralty the court shall proceed with the same according to the rules of such courts;' with the express recognition in section nine of the 'same rights of appeal or writs of error' in any suit brought under this act as were reserved in the statutes of the United States in that behalf at the date of the passage of the act; with the *requirement*, in the same section, that 'the *modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like cases;*' and with the provision in section ten, making it the duty of the district attorney, when the Attorney General shall determine 'whether *an appeal or writ of error shall be taken or not' in cases in which 'the judgment or decree' shall be adverse to the Government*, to cause '*an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same.*' These phrases, clauses, and provisions make it, we think, reasonably clear that Congress intended that the final determination of suits brought under this act in a district or circuit court of the United States *shall be reviewed here upon writ of error if the case be one at law, and upon appeal if the case is one cognizable in equity* or in admiralty under the existing statutes regulating the jurisdiction of those courts."

Chase vs. United States, 155 U. S., 498, 499.

An appeal having been taken in this case at law, in which a writ of error would alone lie under the act, this Court will dismiss the appeal.

Sec. 691, Rev. Stat. U. S.; 94 U. S., 111.

Kelsey *vs.* Forsyth, 21 Howard, 85.

Washington Co. *vs.* Durant, 7 Wall., 694; 103 U. S., 304.

See also the action of the circuit court of appeals in this case, as by certified record as Exhibit A, and also the following cases in United States circuit court of appeals:

"The plaintiff below, appellee here, supervisor of elections, brought *his action at law* against the United States for certain items of services claimed by him and disallowed by the First Comptroller of the Treasury. The cause was heard by the court and the greater part of his claim allowed the petitioner. The United States filed its petition for an appeal, which was allowed, and the cause thus comes here. This being an action of legal demand, and properly an action at law, errors in the court below cannot be reviewed in this court except by writ of error. (Act March 3, 1887, ch. 369, sec. 9 (1 Supp. Rev. St., 561); *U. S. vs. Fletcher*, 8 C. C. A., 453; 60 Fed., 53.) The cause coming here by way of appeal, this court has no jurisdiction over it. (*Chase vs. U. S.*, 15 Sup. Ct., 174.) It is therefore dismissed."

U. S. vs. Tinsley, 73 F. R., 369.

Second Ground.

It appears by the certified transcript of record (Exhibit A) that the United States, at its election, took this *whole case* to the circuit court of appeals for the fourth circuit, and that the same was dismissed by that court on October 4, 1894 (see Exhibit A, fol. 31). It appears, further, that there was in the record a question of jurisdiction of the circuit court of the United States for the district of South Carolina made also in this court by first assignment of error (fol. 17, Record), and on that question the jurisdiction was sustained (fol. 16, Record), and it also appears that the judgment on the merits was rendered in favor of plaintiff (fol. 16, Record).

On this state of fact we submit that the appeal by the

United States to this Court on the whole case should be dismissed here.

This Court has fully analyzed the act of 1891 and its requirement, and said in *U. S. vs. Jahnz.*, 155 U. S., 114–115 :

"It is conceded that the United States assigned errors on the merits as well as the error under consideration, and as the question of jurisdiction lay at the threshold, and the intent of the act of March 3, 1891, was that that question should be determined by this court, the circuit court of appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate. This was in accordance with the early case of McLish *vs.* Roff, 141 U. S., 661, in which it was held that the writ of error or appeal could be taken only after final judgment, except in the cases specified in section 7 of the act, and Mr. Justice Lamar, delivering the opinion, said: 'When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the *circuit court of appeals upon the whole case.* If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court.' The same course was pursued in New Orleans *vs.* Benjamin, 153 U. S., 411. The case was one in which the question of jurisdiction was raised in the circuit court, the jurisdiction maintained, and judgment rendered on the merits. The defendant did not ask that the question of jurisdiction be certified to this Court by the circuit court, but carried the *whole case* to the circuit court of appeals, and that court certified to us the questions involving the jurisdiction, which were accordingly answered.

"Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the ques-

tion certified and take his appeal or writ of error directly to this Court; (2) if the question of jurisdiction is in issue and the jurisdiction is sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where if the question of jurisdiction arises the circuit court of appeals may certify it; (3) *if the question of jurisdiction is in issue and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court;* (4) if in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) the same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

United States vs. Jahnz, 155 U. S., 114–115.

The facts of the case at bar bring it within the third class of cases defined by this Court, and the United States having carried the *whole case* to the circuit court of appeals, and it being there dismissed, this court could have no further jurisdiction of the whole case.

Third Ground.

The record shows not only that this case has been by the United States carried to the United States circuit court of appeals and dismissed on the whole case (see Exhibit A), but that there is even no "*certificate*" of the question of jurisdiction of the circuit court of the United States for the district of South Carolina raised in this record in the first assignment of error by the United States (fol. 17).

This absence of a *certificate* would also make this appeal to this Court fatal under *United States vs. Jahnz*, 155 U. S., 115, *supra*, as this case falls under the *third* class therein enumerated at page 115.

Colvin *vs.* Jacksonville, 159 U. S., 368.

Maynard *vs.* Hecht, 151 U. S., 326.

We submit that on each of these three separate grounds this appeal should be dismissed for want of jurisdiction of this Court.

J. P. K. BRYAN,
Counsel for Appellee, Mitchell King.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

THE UNITED STATES, APPELLANT,

vs.

MITCHELL KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA, AT CHARLESTON.

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TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA, *District of South Carolina,* } *To wit:*

IN THE CIRCUIT COURT, FOURTH CIRCUIT.

At a circuit court of the United States for the fourth circuit in and for the district aforesaid, begun and holden at Charleston, in the district aforesaid, on the 13th day of November, 1893, before the Honorable Charles H. Simonton, judge of the United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, and the following proceedings were had:

MITCHELL KING, *Plaintiff, Petitioner,*
vs.
THE UNITED STATES, *Defendant.*

Be it remembered that heretofore, to wit, the nineteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, the said plaintiff, petitioner, by his attorneys, Messrs. Bryan & Bryan, filed the following petition and complaint; which petition and complaint is in the words and tenor following:

PETITION AND COMPLAINT.

UNITED STATES OF AMERICA, *District of South Carolina.*

CIRCUIT COURT. FOURTH CIRCUIT.

MITCHELL KING, *Plaintiff, Petitioner,*
vs.
UNITED STATES, *Defendant.*

Petition and Complaint.

To the Circuit Court of the United States for the District of South Carolina:

The petition and complaint of Mitchell King, complaining against the United States, respectfully shows and alleges:

First. That the plaintiff, your petitioner, Mitchell King, is a citizen of the United States, and resides at "Kingstree plantation," in the county of Beaufort, in the State and district of South Carolina.

Second. That your petitioner has a claim against the United States of America for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

Third. That your petitioner was at the times hereinafter mentioned and now is owner of a certain rice plantation on the waters of the Savannah river more particularly described as follows, to wit:

"All that rice plantation or parcel of land, situate, lying, and being in the county of Chatham, in the State of Georgia, on the upper portion of Argyle island, commonly known by the name of 'Red Knoll,' containing 414 acres, more or less, bounded by Savannah Middle river, Savannah Back river, and lands of Anthony Barclay and Henry McAlpin, which

lands of said Barclay and McAlpin formerly appertained to the estate of Richard N. Styles and were laid off from lands formerly of the estate of the late Richard Wayne the elder, deceased, and having such shape as is delineated on a certain map or plan of John McKinnon, surveyor, which shows as well the 414 acres sold to M. C. King by the Hon. James N. Wayne, associate justice of the Supreme Court of the United States, on the 11th of March, 1844, as lands allotted to the estate of the said Richard N. Styles, 1844, belonging to the said Barclay and McAlpin, and which map bears date the 12th day of April, 1824," as the same is particularly described in the deed of conveyance of the Hon. Samuel M. Wayne aforesaid to Mitchell C. King in ——, 1844.

Fourth. That the said rice plantation of "Red Knoll" as aforesaid, lying at the head of Argyle island, at the junction of the Savannah Middle river with the Savannah Back river, is distant from and above the city and port of Savannah, State of Georgia, about nine miles.

Fifth. That the said plantation for the space of seventy years and upwards has been a rice plantation, with great labor and expenditure of money reclaimed and established and maintained as a plantation solely for the cultivation of rice, adapted thereto by the level of the lands thereof in relation to the natural level of the waters of the said Savannah river, and depending for its proper drainage and cultivation upon the maintenance of the natural flow of the said Savannah river in, through, and over its natural channel along its natural bed to the waters of the Atlantic ocean, and depending also upon the maintenance of the natural and regular rise and fall of the waters of the said Savannah river under the influence of the tides therein and thereupon.

Sixth. That heretofore for several years continuously and now continuously the said Government of the United States of America, in the exercise of its power of eminent domain

under the Constitution of the United States and by authority of the acts of Congress duly empowering its officers and agents thereto, in that case made and provided, did erect, build, and maintain and continuously since have been erecting, building, and maintaining and are now building, erecting, and maintaining in and across the said Savannah river, in the bed of the said Savannah river, certain obstructions and dams obstructing and hindering the natural flow of the said Savannah river through, in, and along the natural bed thereof and raising the said Savannah river — feet at the point of and above the said obstructions or dams in the bed of the said Savannah river and causing the said waters of the Savannah river aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah river along its natural bed at the points of the said dams and obstructions and at points above the said dams and obstructions in said river.

Seventh. That the said dams and obstructions have been and are being erected and maintained in the bed of said river at a great height at divers places in said river, below the said plantation of your petitioner.

Eighth. That the effect of the said dams and obstructions in said Savannah river upon the said rice plantation of your petitioner commonly known as "Red Knoll" is that it backs the waters of the Savannah river in and upon the said plantation and it raises and forces back the waters of the Savannah river at, in, and around and upon the said plantation to the height of about two feet over and above the natural and ordinary level of the said Savannah river existing at, in, and around the said plantation at the time of its establishment as a rice plantation and previous to the erection and maintenance of the said obstructions and dams by the United States, and thus preventing the natural outflow of water from the said plantation, necessary for the

purpose of drainage and cultivation of said plantation, and preventing the established and proper inflow and outflow of the waters of the Savannah river, necessary to the cultivation of the said plantation as a rice plantation, and further filling the ditches and saturating the lands with water and preventing the outflow of water from the said "Red Knoll" plantation and submerging and destroying the crops and preventing the drainage of the said plantation for cultivation for any purpose whatsoever, and that by the said superinduced additions of water, actually invading the said rice plantation, the same is permanently injured and effectually destroyed.

Ninth. And your petitioner further shows that the said acts of the Government of the United States as aforesaid have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah river at the port of Savannah, a port of entry of the United States and seaport of the United States of America, situated within the State of Georgia, on the Savannah river, a navigable river of the United States navigable to the Atlantic ocean, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah river, a boundary between the States of South Carolina and Georgia and a navigable river of the United States, for the public use, purpose, and benefit of interstate and foreign and international trade and commerce and for other public purposes, uses, and benefits.

Tenth. The plaintiff, petitioner, further shows and alleges that by reason of the premises there is due and owing unto

the plaintiff, petitioner, by the United States for and in consideration of the facts hereinbefore alleged and the taking by the United States of the said plantation for public uses, as in the manner and form heretofore alleged, the sum of ten thousand dollars ($10,000), the value of and lawful compensation for such property so taken.

Wherefore the plaintiff, petitioner, prays judgment against the United States of America for the sum of ten thousand dollars ($10,000).

BRYAN & BRYAN,
Attorneys of Mitchell King, Plaintiff, Petitioner.

UNITED STATES OF AMERICA, }
District of South Carolina. }

Personally appeared Mitchell King, plaintiff, petitioner, herein and makes oath that the matters and things set forth and stated in the above complaint and petition are true to his own knowledge.

MITCHELL KING.

Sworn to before me this 19th day of January, 1893.

ARTHUR BRYAN,
[L. S.] *Notary Public for S. C.*

Filed 19th January, 1893.

AFFIDAVIT OF SERVICE.

UNITED STATES OF AMERICA,
District of South Carolina.

IN THE CIRCUIT COURT, FOURTH CIRCUIT.

MITCHELL KING
vs.
THE UNITED STATES.

Petition and Complaint. Filed 19th January, 1893.

Personally appeared H. W. Hendricks, dep. marshal U. S., district South Carolina, and makes oath that he served the above petition and complaint on Hon. Abial Lathrop, district attorney of the United States for the district of South Carolina, by leaving a certified copy of the same with B. A. Hagood, ass't U. S. dist. att'y S. C., at the office of the U. S. district attorney, Charleston, S. C., on the 20th day of January, 1893, and deponent is not a party to or interest in the result of this action.

Deponent further makes oath that he mailed a certified copy of the said petition and complaint by registered letter to the Hon. W. H. H. Miller, Attorney General of the United States, by depositing the same, enclosed in an envelope, in the post-office at Charleston, S. C., on the 20th day of January, 1893, addressed "Hon. W. H. H. Miller, Attorney General of the United States, Washington, D. C," postage prepaid.

W. H. HENDRICKS,
Chief Dep'ty U. S. M.

Sworn to before me this 20th day of January, 1893.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Filed 20th January, 1893.

ANSWER.

THE UNITED STATES OF AMERICA,
District of South Carolina.

CIRCUIT COURT, FOURTH CIRCUIT.

MITCHELL KING
vs.
THE UNITED STATES.

The defendant, by Abial Lathrop, United States attorney for the district of South Carolina, answering the petition and complaint herein, alleges:

I. That this defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the first, third, fourth, and fifth paragraphs of the said petition and complaint.

II. This defendant admits the allegations contained in the "sixth" and "ninth" paragraphs of the said petition and complaint and so much of paragraph "seven" as alleges that the said dams and obstructions have been and are being erected and maintained in the bed of the said river, at divers places in said river, below the plantation of the plaintiff, petitioner.

III. That this defendant denies all the allegations contained in paragraphs "second," "eighth," and "tenth" of the said petition and complaint.

IV. That this defendant denies each and every allegation in the said petition and complaint not hereinbefore specifically admitted or denied.

Wherefore this defendant prays judgment that the said

petition and complaint be dismissed and for the costs of this action.

ABIAL LATHROP,
U. S. Attorney, Defendant's Attorney.

UNITED STATES OF AMERICA, }
District of South Carolina. }

Personally appeared before me Abial Lathrop, United States attorney, and made oath that the above and foregoing answer is true to the best of his knowledge, information, and belief; that his information is derived from certified copies of department records on file in his office.

ABIAL LATHROP,
U. S. Attorney.

Sworn to and subscribed before me this 16th March, 1893.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

TRIAL OF CAUSE.

At a special term of the circuit court begun and holden at Charleston, S. C., on the 11th day of October, 1893, and continued from day to day until the 13th day of November, 1893, this cause came up for trial before the court. The pleadings were read and an oral demurrer was entered by the district attorney for the United States. The following witnesses were sworn and examined on behalf of the plaintiff, to wit, Mitchell King, J. H. Lynah, and Alfred Chisolm, and the following witness was sworn on behalf of the United States, to wit, O. M. Carter. Arguments were made by Mr. J. P. K. Bryan, on behalf of plaintiff, and by Mr. Wm. Perry Murphy, U. S. attorney, on behalf of the United States. The court took the case under advisement.

FINDINGS OF FACT AND LAW.

UNITED STATES OF AMERICA,
District of South Carolina.

IN THE CIRCUIT COURT.

MITCHELL KING
vs.
THE UNITED STATES.

This action was brought in this court under provision of act of Congress, March 3rd, 1887, chapter 359, sections, 1, 2, &c.

Findings of Fact.

1. The above petition was in compliance with the requirements of act of March 3rd, 1887, chapter 359, duly filed in the clerk's office, circuit court of the United States for the district of South Carolina, on the 19th day of January, 1893, and copies thereof duly served on the United States district attorney and the Attorney General of the United States, and said law in all respects complied with.

2. Mitchel King, the plaintiff, is a rice-planter on the Savannah river. He owns a plantation on the South Carolina side of the river, in Beaufort county. His sole occupation is cultivating this plantation. To this end, and since 1890, he has been living upon it from November until the middle of May in each year, in a furnished dwelling-house, and domestic servants. After 15th May he goes to Savannah, the plantation then becoming unhealthy, and lives in a boarding-house, visiting his plantation at intervals longer or shorter, as the state of the crop may require.

He has registered and voted in Savannah and does not vote in South Carolina.

3. He owns in fee-simple another plantation on the Savannah river, the subject-matter of this suit, particularly described in the complaint, known as "Red Knoll," formerly used exclusively in the cultivation of rice, situated on Argyle island, about 12 miles by river above the city of Savannah. This plantation has been cultivated in rice for very many years and was in first-class order. It has been owned by plaintiff since 1881, contains 414 acres, and with the natural flow of the current of the Savannah river and unimpaired drainage is worth from 30 to 40 dollars per acre by market value.

4. Plaintiff continued to plant rice since his ownership, in 1881. His crops grew worse and worse, and in 1888 he abandoned the plantation, it having become unfit for cultivation. It is not now cultivated except in small knolls or patches and by colored people.

5. On the Savannah river where this plantation lies the water is always fresh, and land below high-water mark and above low-water mark is reclaimed from the river by dykes or banks. Through these banks are inserted trunks or wooden boxes, having flood-gates in each of them, leading into canals and ditches through the reclaimed land. Through these the lands are irrigated, and through them also the lands are drained when the time comes for draining the water off. The rise and fall of the tide (fresh water) contributed materially to this drainage.

6. In — the United States Government, in the lawful exercise of its powers of eminent demain and regulation of commerce, under appropriations made for several years and now being made by Congress for the purpose and under the direction of the Secretary of War, vested with full discretion by Congress in the premises, erected and are now erecting and maintaining certain structures in the Savannah river,

beginning at points below this plantation, said structures being intended both to deepen the channel and to raise the natural level of the current of that river. One of these, and the most important, is the cross-tide dam between Hutchinson island and Argyle island, completed in 1885. This is the obstruction nearest to this plantation of plaintiff, being about six miles off.

7. By reason of this obstruction the direction of the current is changed, the force of the ebb tide in the river is diminished, and the fresh water is backed up toward the plantation of plaintiff, raising the level of the current above its normal natural level from 12 to 18 inches at the banks of the said plantation. This result followed the erection of the cross-tide dam, and the height of the water has remained the same since that time to the present.

8. The first effect of this is to deprive the plantation of that much fall of the tide, and so diminish its drainage. Another result is that the trunks, which theretofore necessarily had been placed just above the level of low tide, came below that line. Another result was that by seepage the water pressed under the bank and rose in the plantation in a number of small springs, until gradually the water level in the land rose to the height of the increased water level in the river, and the superadded water in the plantation was eighteen inches thereby.

9. The general result is that by reason of the diminished drainage capacity of the plantation neither the water let in for the purpose of irrigation nor overflows from freshets nor the superadded water thus forced into the plantation by seepage could be gotten off the land, which thereby and therefrom became sodden, sour, and boggy, gradually losing its productive power, so that in 1888 it became almost valueless, certainly for rice-planting and probably for any other

known system of agriculture. This is its present and permanent condition, and its ordinary and necessary use for agriculture is destroyed.

10. This gradual result was begun to be felt when the cross-tide dam was finished, and was experienced in 1885, 1886, and 1887, and gradually grew worse and has existed continually to the present time. The plantation was finally abandoned from these causes in 1888.

11. Beyond the backing up of the water on and in the plantation by reason of the obstructions and this invasion of these lands by this superadded water around and in the plantation as above described, rendered necessary by the execution of the Government plans as above set forth, the United States Government has not and does not use these lands for any purpose nor is in possession of them nor any part of them.

12. That the purpose of raising the waters of the Savannah river and backing the waters thereof at and upon, around and in the plantation of the petitioner is for the improvement of the harbor of Savannah and deepening the waters of the Savannah river at the port of Savannah, a port of entry of the United States, situated within the State of Georgia, on the Savannah river, a navigable river of the United States.

13. The difference between the market value of the said plantation described in the petition before the obstructions of the United States Government above set forth and the value of the plantation after the said obstructions and the backing of the waters of the Savannah river upon, at, in, and around said plantation is the sum of ten thousand dollars, the amount claimed by the petitioner.

The district attorney in behalf of the United States entered his motion to dismiss the petition on these grounds:

1st. Because the plaintiff is not a resident of this district, and for this reason the court has no jurisdiction on his claim.

2nd. That this cause of action accrued in 1885, when the cross-tide dam was erected, more than six years before he filed his petition, and he cannot maintain his suit. It is a condition precedent to his right to sue that the cause of action accrued within six years prior to his suit.

3d. That the evidence discloses no such taking of the plaintiff's land for public purposes as brings him within the fifth amendment and so entitled to compensation.

CONCLUSIONS OF LAW.

1st. The plaintiff having his business in South Carolina, remaining in that State six months in the year, with a house in which he lives and domestics by whom he is served, leaving during the unhealthy season for health only, is a resident of this district and the court has jurisdiction on his claim.

2nd. Although the water in Savannah river was raised and thrown on the plantation when the dam was built, in 1885, the full consequences were not ascertained and realized until 1888, when the plantation was abandoned. In that year the cause of action was complete. This action begun in 1893 is within the statutory period of six years.

3rd. The Government has not gone into actual occupancy of this land; but by reason of this public work, occasioned by the public work, fulfilling its purpose, the water in Savannah river has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the

land for public purposes for which compensation must be provided. (Pumpelly *vs.* Green Bay Co., 13 Wall., 181.)

4th. The claimant is entitled as his compensation to ten thousand dollars. Let judgment be entered accordingly, and for costs allowed by statute.

CHARLES H. SIMONTON,
U. S. Judge.

11th December, 1893.

JUDGMENT.

UNITED STATES OF AMERICA,
Eastern District of South Carolina.

CIRCUIT COURT, FOURTH CIRCUIT.

MITCHELL KING, *Plaintiff*,
vs.
THE UNITED STATES, *Defendant.*

Judgment by the Court.

This action having been brought to a trial by the court, and conclusions of facts and of law having been duly found and filed by the court on the eleventh day of December, 1893, whereby ten thousand dollars was found to be due to the plaintiff, Mitchell King, by the defendant, The United States, and an order to enter judgment accordingly was therein contained—

Now, on motion of Bryan & Bryan, attorneys for Mitchell King, plaintiff—

It is adjudged that Mitchell King, plaintiff, recover of the said The United States the sum of ten thousand dollars, so found, with forty-nine $\frac{50}{100}$ dollars costs.

BRYAN & BRYAN,
Petitioner Plaintiff's Attorneys.

Taxed costs, signed judgment, 15th December, 1893.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S. Dist., S. C.

Filed 15th December, 1893.

PETITION FOR APPEAL.

THE UNITED STATES OF AMERICA, *District of South Carolina.*

IN THE CIRCUIT COURT.

MITCHELL KING, *Plaintiff, Petitioner,*
vs.
THE UNITED STATES, *Defendant.*

To the Honorable the Judges of the United States Circuit Court for the District of South Carolina:

The United States of America prays an appeal from the decision and judgment of the circuit court in this case to United States circuit court of appeals for the fourth circuit and for a citation, etc., and that a copy of the record in this cause be duly certified to the said United States circuit court of appeals.

And your petitioner humbly prays the court to pass said order for appeal in this case to the end that the opinion and judgment of this honorable court may be reviewed on the several matters assigned for error, duly filed herewith, and reversed by the said United States circuit court of appeals for the fourth circuit.

And your petitioner will ever pray, &c.

WM. PERRY MURPHY,
U. S. Attorney, Attorney for Appellant, by the Direction of the Attorney General.

Filed May 18, 1894.

ASSIGNMENT OF ERRORS.

THE UNITED STATES OF AMERICA,
District of South Carolina.

IN THE CIRCUIT COURT.

MITCHELL KING, *Plaintiff, Petitioner,*
vs.
THE UNITED STATES, *Defendant.*
} Assignment of Errors.

To the Honorable the Judges of the Circuit Court for the District of South Carolina:

The defendant, by counsel, respectfully assigns the following errors to the findings of fact and conclusions of law on the trial of the above-entitled cause:

I.

That the court erred in holding that the plaintiff was a resident of the district of South Carolina, whereas the court should have held that he was not a resident of said district, and therefore that the court had no jurisdiction in the cause.

II.

The court erred in not finding that the water at and above the cross-tides dam attained its greatest height in the year 1885, at the time the said dam was finished, and that the complainant's cause of action accrued at that time.

III.

That the court erred in finding that this action was brought within six years after the right accrued for which the claim was made.

IV.

That the court erred in not holding as a matter of law that the complainant's cause of action accrued in 1885, and therefore that he was barred by the statute of limitations.

V.

That the court erred in holding as matter of law that there was such a taking, within the meaning of the Constitution of the United States and the acts of Congress, as entitled the complainant to recover in this action.

VI.

That the court erred in holding that the damages complained of were such as were recoverable in an action against the United States.

VII.

That the court should have held that this was a case sounding in tort, and that therefore the court was without jurisdiction in the cause.

VIII.

That the court erred in holding that there was any contract between the plaintiff and the defendant, either express or implied, under which the plaintiff was entitled to recover judgment against the defendant.

IX.

That the court should have held that the damages suffered by the petitioner resulted from the exercise of the para-

mount right of the United States to improve the navigable waters of the United States and was, therefore, "*damnum absque injuria.*"

X.

That the court should have held that the damages were consequential and not direct, and therefore the plaintiff was not entitled to recover.

WM. PERRY MURPHY,
U. S. Attorney.

Filed 18th May, 1894.

ORDER ALLOWING APPEAL.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

IN THE CIRCUIT COURT.

MITCHELL KING, *Plaintiff, Petitioner,* }
vs. }
UNITED STATES, *Defendant.* }

Let the appeal be allowed and the citation issued as prayed for.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 18th May, 1894.

MARSHAL'S RETURN OF SERVICE.

UNITED STATES OF AMERICA, }
District of South Carolina. }

IN THE CIRCUIT COURT.

Personally appeared before me H. J. Hickson, deputy U. S. marshal, who, being duly sworn, says that he personally served a copy of the within petition for appeal, assignment

of errors, and order allowing appeal on J. P. K. Bryan, of the firm of Bryan & Bryan, attorneys for the plaintiff, Mitchell King, by leaving a copy with him in person at the custom-house, at Charleston, S. C., and that he knows the person so served to be the counsel of record for Mitchell King in the case of Mitchell King, plaintiff, against The United States, defendant.

H. J. HICKSON,
Deputy U. S. M.

Sworn to before me this 23d day of May, 1894.

C. J. MURPHY,
Deputy C. C. C. U. S., Dist. S. C.

CITATION.

THE UNITED STATES OF AMERICA:

The President of the United States to Mitchell King, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond, on the 20th day of June, 1894, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein The United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles H. Simonton, circuit judge of the United States for the fourth judicial circuit, this 22d day of May, A. D. 1894.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 23d May, 1894.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

UNITED STATES OF AMERICA,
District of South Carolina.

On the 23d day of May, 1894, personally appeared H. J. Hickson, dept. U. S. marshal, before me, the subscriber, C. J. Murphy, deputy C. C. C. U. S., dist. S. C., and makes oath that he delivered a true copy of the within citation to J. P. K. Bryan, of the firm of Bryan & Bryan, counsel for Mitchell King, in the case of Mitchell King, plaintiff, against The United States.

H. J. HICKSON,
Deputy U. S. M.

Sworn to and subscribed before me this 23d day of May, 1894.

[SEAL OF COURT.]

C. J. MURPHY,
Deputy C. C. C. U. S., Dist. S. C.

Entered in Docket Civil Cases, fol. 27, this May 23, 1894.

J. P. HUNTER,
U. S. Marshal.

CLERK'S CERTIFICATE.

THE UNITED STATES OF AMERICA,
District of South Carolina.

IN THE CIRCUIT COURT, FOURTH CIRCUIT.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Mitchell King, plaintiff, petitioner, against The United States, defendant, rendered as aforesaid, together with the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's

office, in the city of Charleston, S. C., and district of South Carolina, this the 19th day of May, A. D. 1894.

[SEAL OF THE COURT.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

JUDGMENT OF DISMISSAL. Filed October 4, 1894.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

THE UNITED STATES, *Appellant*,
vs.
MITCHELL KING, *Appellee*. } No. 91.

Appeal from the circuit court of the United States for the district of South Carolina.

This cause having been called on the motion to dismiss the appeal and the same being argued and submitted—

It is now ordered and adjudged by this court that the appeal be, and the same is hereby, dismissed, it having been improvidently awarded, the judgment below being subject to review by writ of error and not by appeal.

N. GOFF.

Oct. 4, 1894.

MANDATE. Issued October 24, 1894.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of South Carolina, Greeting:

[Seal of the Court.]

Whereas lately, in the circuit court of the United States for the district of South Carolina, before you or some of you, in a cause between Mitchell King, plaintiff, and The

United States, defendant, wherein the judgment of the said circuit court, entered in the said cause on the 15th day of December, 1893, is in the following words, to wit:

"This action having been brought to a trial by the court, and conclusions of facts and of law having been duly found and filed by the court on the eleventh day of December, 1893, whereby ten thousand dollars was found to be due to the plaintiff, Mitchel King, by the defendant, The United States, and an order to enter judgment accordingly was therein contained:

"Now, on motion of Bryan & Bryan, attorneys of Mitchell King, plaintiff, it is adjudged that Mitchell King, plaintiff, recover of the said United States the sum of ten thousand dollars so found, with forty-nine $\frac{50}{100}$ dollars costs."

As by the inspection of the transcript of the record of the said court, which was brought into the United States circuit court of appeals for the fourth circuit by virtue of the appeal of the United States, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the term of October, in the year of our Lord one thousand eight hundred and ninety-four, the said cause came on to be heard before the said United States circuit court of appeals for the fourth circuit on the said transcript of record, and was argued by counsel on the motion to dismiss the appeal:

On consideration whereof it is now here ordered and adjudged by this court that the appeal be, and the same is hereby, dismissed, it having been improvidently awarded, the judgment below being subject to review by writ of error and not by appeal.

N. GOFF.

Oct. 4, 1894.

You therefore are hereby commanded that such further proceedings be had in said cause, by way of execution, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Costs of Appellee.

Clerk ...	$16 20
Attorney	20
Exhibit "A"	17
Printing, do	21
	$74 20

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the annexed and foregoing are true copies of the record certified to this court on appeal from the circuit court of the United States for the district of South Carolina, and of the judgment and mandate of this court entered and issued thereon in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the [SEAL OF COURT.] United States circuit court of appeals for the fourth circuit, at Richmond, on this 4th day of February, A. D. 1896.

HENRY T. MELONEY,
Clerk U. S. C't. Ct. Appeals, 4th Circuit.

Cost of certified copies, $12.50.